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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

OCT 24 1997

FEDERAL COMMUNICATIONS COMMISSION

OFFICE OF THE SECRETARY

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of

Procedures for Reviewing Requests for
Relief From State and Local Regulations
Pursuant to Section 332(c)(7)(B)(v)
Communications Act of 1934

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) WT Docket No. 97-192
)
)
)

Guidelines for Evaluating the
Environmental Effects of Radiofrequency
Radiation

)
) ET Docket No. 93-62
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Petition for Rulemaking of the Cellular
Telecommunications Industry Association
Concerning Amendment of the
Commission's Rules to Preempt State
and Local Regulation of Commercial
Mobile Radio Service Transmitting
Facilities

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) RM-8577
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To: The Commission

Reply Comments of Ameritech Mobile Communications, Inc.

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Table of Contents

Summary	iii
I. Section 332(c)(7)(B)(v) Allows Commission Review Upon any "Act or Failure to Act", Without Regard to Whether a "Final Action" Has Been Taken.	2
A. "Final Action" is Not Required for Commission Review.	2
B. Definition of "Failure to Act".	4
II. The Commission Must Preempt Actions Based in Part on RF Concerns.	5
III. The Commission Should Prevent Non-Governmental Entities from Regulating RF Emissions.	6
IV. The Commission Should Adopt its Less Restrictive First Alternative for Demonstrating Compliance to State and Local Governments.	8
Conclusion	12

Summary

Ameritech agrees with those commenters that have demonstrated that final action by a state or local government is not necessary for Commission review of their regulation of RF emissions. The record in this proceeding demonstrates that licensees should only have to certify compliance and provide the same documentation submitted to the Commission, in order for state and local governments to verify compliance.

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To: The Commission

REPLY COMMENTS

Ameritech Mobile Communications, Inc. (Ameritech), by its attorneys, hereby submits its reply comments on the Commission's proposals concerning preemption of state regulation of radio frequency (RF) matters in its Second Memorandum Opinion and Order and Notice of Proposed Rulemaking ("Notice") in the above captioned proceeding, FCC 97-303, released August 25, 1997. As discussed below, the record demonstrates that the Commission should require licensees to provide state and local governments with no more information concerning RF compliance than these entities are required to provide to the Commission. This is especially true for categorically exempt licensees. Otherwise, the record makes it clear that state and local governments will impose severe and unnecessary burdens on Commission licensees that will frustrate the Congressional mandate for rapid deployment of advanced technologies, and will threaten the competitiveness of Commercial Mobile Radio Service ("CMRS") providers.

I. Section 332(c)(7)(B)(v) Allows Commission Review Upon any "Act or Failure to Act", Without Regard to Whether a "Final Action" Has Been Taken.

The Commission has posed certain definitional questions in the Notice, to help determine under what circumstances review of state and local zoning actions will be triggered. As discussed below, Ameritech agrees with those commenters who demonstrate that the Commission's focus on what constitutes a "final action" is misplaced.

A. "Final Action" is Not Required for Commission Review.

In particular, the Commission has proposed that licensees could seek Commission review of a state or local ruling once this ruling became a "final action." Notice at p.137. Upon review of the comments in this proceeding, Ameritech agrees with BellSouth Corporation, Primeco and others who point out that the Commission's right of review is triggered by any "act or failure to act" by a state or local government that is inconsistent with the restrictions of Section 332(c)(7)(B)(iv) of the Communications Act of 1934, as amended (the Communications Act). In contrast, a "final action" is required by Section 332(c)(7)(v) only when seeking review by a "court of competent jurisdiction." Therefore, this difference in wording reflects the conscious choice of Congress that the Commission have a broader review power than the courts, which can be invoked before state and local administrative review processes have been completed.

In this regard, the National League of Cities and the National Association of Telecommunications Officers and Advisors (hereinafter "NLC") errs in arguing that the Commission can review an ordinance or ruling only upon a "final action," which NLC interprets to mean after all local regulatory reviews and appeals have been concluded. NLC Comments at pp. 7-8. While NLC argues that a local zoning board must be allowed to complete the internal review process before any FCC oversight, citing Rule Section 1.115(k)

by analogy, Congress has decided otherwise. Because of its overriding Federal objective to ensure the rapid deployment of advanced telecommunications services, Congress has substituted the Commission as the entity responsible for expedited review of zoning actions relating to RF emissions. If licensees must first exhaust state and local review procedures, it will take months to resolve such issues, before Commission review can be invoked.

In this regard, NLC bases its interpretation of the Commission's authority under Section 332 on faulty logic. In particular, NLC argues that the Commission's authority over state actions concerning RF emissions is "very limited." NLC reasons that, under Section 332(c)(7)(B)(v), the Commission can exercise its jurisdiction only when the state regulates personal wireless facilities on the basis of RF emissions, and the facilities comply with the Commission RF regulations. NLC Comments at p. 12. Otherwise, the Commission is relegated to a very narrow review function, which it must share with the courts, according to NLC. However, while Section 332 (c)(7)(B) of the Communications Act limits the Commission's jurisdiction over other aspects of zoning decisions, Subsections 332(c)(7)(B)(iv) and (v) create a sweeping exemption from this limitation when it comes to RF matters. The statute does not state that the Commission's jurisdiction is limited to situations in which the licensee is in compliance. This would be an absurd result, since the Commission is the agency with the expertise and power to bring enforcement actions against violators of its RF rules. Instead, Section 332(c)(7)(B)(iv) forbids a state or local government to "regulate the placement, construction and modification of personal wireless facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission regulations concerning such emissions."

Thus, this language is a limit on a state or local government's authority, not the Commission's authority. Congress could have indicated that state and local governments are not allowed to adopt conflicting RF regulations, or requirements which are more burdensome than

the Commission's regulations. Instead, Congress simply forbade state and local governments to regulate RF emissions in any manner. The decision of Congress to allow Commission review of any "act or failure to act" (versus "the final action" required for court review) demonstrates its intent that the Commission have broad authority over RF matters. Therefore, NLC's strained interpretation misses the mark.

PrimeCo Personal Communications, L.P. ("PrimeCo") agrees with Ameritech that licensees should be able to challenge an adverse ordinance on its face, without awaiting a zoning board hearing. See, PrimeCo Comments at p. 12. The Commission's goal of rapidly resolving zoning delays would be defeated if licensees must await local action on a particular zoning request when it is clear from the face of the ordinance that the request will be denied. The Commission's authority to review any adverse "act" by a state or local government, without awaiting a "final action," supports this analysis.

B. Definition of "Failure to Act".

NLC also argues that the Commission cannot reasonably enforce a "failure to act" by a state or local government, because the Commission allegedly lacks authority to interpret the phrase "reasonable period of time" in Section 332(c)(7)(B)(ii), and because the Commission "can only share jurisdiction with the courts over such matters,..." NLC Comments at pp. 9-10. Again, NLC uses a contorted interpretation of the act. Congress has given the Commission broad authority over any act or failure to act by a state or local government concerning RF emissions. As the regulatory agency given this authority, it is well within the Commission's power to interpret the term "reasonable period of time" and any other definitions in the authorizing statute necessary to carry out its responsibilities. In this regard, Federal regulatory agencies have been given the task of filling in "gaps" in the meaning of statutory

definitions. See Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 843-44(1984). When faced with a statute that is imprecise, the Federal agency "is entitled to choose any reasonable definition..." K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 292(1988).

Ameritech agrees with the Personal Communications Industrial Association ("PCIA") that it will be counterproductive for the Commission to determine what constitutes a "reasonable period of time" on a case-by-case basis, because litigation over this term in each case will only exacerbate any delay. See, PCIA Comments at pp. 6-7. Therefore, Ameritech repeats its request that the Commission establish a definite timetable within which zoning authorities must act. See also, Comments of the Cellular Telecommunications Industry Association ("CTIA") at p. 5 (90 day deadline for "failure to act").¹

II. The Commission Must Preempt Actions Based in Part on RF Concerns.

The Commission has also requested whether it should preempt ordinances or rulings which are based only in part on RF concerns. A number of commenters agreed with Ameritech that such preemption is appropriate. See e.g., Comments of PrimeCo at p. 14; Comments of Bozeman City-County Planning Office ("Bozeman") at p. 2. In this regard, Ameritech agrees with PrimeCo that the Commission should declare an ordinance to be invalid in its entirety if it is based in part of RF considerations. It will be difficult for the Commission or the Courts to be able to determine how much weight was given to non-RF considerations in formulating the ordinance or ruling. By invalidating the action in its entirety, the Commission would encourage state and local governments to safeguard against the use of improper RF considerations, thereby reducing the number of instances in which Commission review would

¹ Ameritech also agrees with PrimeCo that, if state or local inaction on a zoning request is expressly based on RF concerns, immediate Commission review is appropriate, without the passage of a "reasonable period of time." PrimeCo Comments at p. 13.

be required.

NLC argues that the Commission should not review state or local actions based in part on RF concerns, because the Commission is incapable of looking behind the motives of the local government entity. NLC is concerned that this approach would open all state and local actions to second guessing by the Commission, and insists that the Courts are the more appropriate entities to police such matters. NLC Comments at pp. 11-14. However, if the Commission is unable to review and void actions based in part on RF, state and local governments will be able to easily avoid scrutiny by simply reciting a laundry list of other concerns. Congress clearly did not intend that its preemption of state regulation in this area could be so easily defeated. While the Courts are certainly an important part of the review process, the Commission is the Federal agency that has institutional expertise in RF matters, and a staff of engineers and other professionals who are in a far better position than a Court to evaluate the impact of RF concerns on the state or local action. Moreover, the Commission can review the adverse state action promptly, without having to await the conclusion of the local regulatory review process, as discussed above.²

III. The Commission Should Prevent Non-Governmental Entities from Regulating RF Emissions.

A number of commenters agreed with Ameritech that the Commission should prevent homeowner associations and other non-governmental entities from regulating RF emissions.

² Ameritech agrees with NLC and others that an ordinance or ruling should not be invalidated merely because a concerned citizen mentioned RF matters at a hearing. Instead, there should be some basis for the Commission to conclude that RF concerns played a significant role in the decision. Thus, Ameritech agrees with the "principal part" test suggested by Bozeman in its Comments at p. 2. This approach should allay the First Amendment concerns raised by some of the commenters. Ameritech also agrees with Bozeman that Commission action is not warranted where the basis for the state or local RF concerns is the failure of the licensee to provide a verification of compliance with the Commission's RF rules, pursuant to the procedures that will be adopted in this docket. Id.

See e.g., Comments of AT&T Wireless Services, Inc. ("AT&T") at p. 7. Most state and local governments opposed Commission supervision of these entities, since restrictive covenants do not constitute government actions. See Comments of NLC at p. 20; Comments of Bozeman City-County Planning Office at p. 3. NLC argues that restrictive covenants are "not likely to be based on RF concerns." NLC Comments at p. 20. However, NLC refutes this statement when it asserts that "many members of the public have genuine concerns about the health risks associated with exposure to RF emissions." NLC Comments at p. 22. NLC also argues that "local governments have no control over, and thus should have no responsibility for, such actions." Id. at p. 20. Commission supervision of improper RF regulations by homeowners associations would not involve holding local governments responsible for compliance. Moreover, private property owners would retain control over their property. Presumably, a zoning request will not arise unless the land owner has consented to the placement of the proposed antenna. It is important for the Commission to prevent private associations from frustrating the Congressionally mandated objective of rapid and unfettered deployment of advanced telecommunications infrastructure. In this regard, Ameritech agrees with AT&T that such associations "perform quasi-governmental functions" when they regulate RF emissions, and "should be treated as state actors." AT&T Comments at p. 7.

IV. The Commission Should Adopt its Less Restrictive First Alternative for Demonstrating Compliance to State and Local Governments.

Nearly every member of the telecommunications industry commenting in this proceeding advocated adoption of the less burdensome "first alternative" for demonstrating RF compliance to state and local governments. Predictably, every state and local government commenter advocated the more burdensome second alternative, which requires even categorically exempt licensees to submit detailed compliance showings. This divergence of opinions involves more than a choice between parochial interests. Instead, adoption of the first alternative is required by statutory and practical considerations.

While NLC argues that the more burdensome alternative should be the minimum disclosure requirement, it again relies on its incorrect interpretation of Section 332(c)(7)(B)(v). This statutory provision is a limit on the states' zoning authority, not on the Commission's broad jurisdiction over RF matters. As discussed above, the statute decrees that state and local governments simply cannot regulate RF emissions. Therefore, a licensee that is in compliance with the Commission's RF rules should be able to operate in an environment that is free from any state or local RF regulation. The detailed showings required by the Commission's second alternative go way beyond the intent of regulation contemplated by Congress.

In this regard, the Communications Act does not contemplate making licensees "double prove" their compliance. Instead, the statute only creates a limited right for state and local governments to deny zoning approvals to licensees that are not in compliance with the FCC's Rules. Section 332 (c)(7)(B)(v) does not vest in the state and local governments any express power to determine whether a given licensee has complied with the Commission's rules. Therefore, this power must remain vested in the expert Federal agency that created the rules, and that is charged with their enforcement -- namely, the Federal Communications Commission. Therefore, Ameritech agrees with numerous other commenters that the states should be allowed to request a compliance showing no greater than the showing required by the Commission itself. See, Comments of Primeco at p. 7; Comments of AT & T at p. 2-3; Comments of BellSouth

at 4; cf. Comments of CTIA at p. 6.

NLC argues that state and local governments should be allowed to require categorically exempt licensees to provide a demonstration of compliance beyond a mere showing that they are categorically exempt. Cf., Comments of the Local and State Government Advisory Committee ("LSGAC") at p. 3 (Questioning more burdensome showing for exempt licensees). According to NLC, the "public is entitled to a meaningful response and to adequate assurance that their health is not at risk." NLC comments at p.4. NLC goes on to assert that "while categorically excluded facilities by definition are supposed to pose less of a hazard, members of the public cannot be expected to understand such technical distinctions;..." Id. at p.24. In the same vein, Bozeman requests that the Commission require categorically exempt licensees to supply state and local governments with "all four items of information" described in the Notice for the second alternative. Thus, these entities would require a cellular or PCS licensee operating a 250 watt transmitter with its antenna more than 10 meters above ground to expend the resources necessary to (1) measure the controlled and uncontrolled exposure limits applicable to the site; (2)engage in detailed compliance calculations, computer simulations in/or actual field measurements; (3)provide a detailed explanation on site restrictions; and (4)provide an evaluation of other significant transmitting sources located at or near the site. The short answer to this proposal is that the Federal agency charged with enforcing RF compliance has already determined that these facilities do not pose a health hazard to the public. Hence, these facilities have been designated as categorically exempt.

The requests of NLC, Bozeman, and other governmental entities for more detailed compliance showings reflects that these entities wish to impose their own compliance standards on the industry. In other words, they have not accepted the determination of the Commission, based on its careful consideration of scientific information from all sectors of government, industry and the public (including the other Federal agencies responsible for health and safety) that a categorical exemption is warranted. The Commission cannot allow these entities to

impose their own RF regulations under the guise of verifying compliance of categorically exempt licensees. The numerous comments filed by organizations such as The Ad Hoc Association of Parties Concerned about RF Rules, and the Cellular Phone Task Force, demonstrate that if state and local governments are allowed to make these licensees prove their compliance through detailed informational showings, the resulting hearings will turn into a circus of attacks on the Commission's RF rules, to be played out over and over again in communities throughout the country. The telecommunications industry cannot function if it must prove the validity of the Commission's RF rules every time an antenna is to be mounted.³

In this regard, a number of commenters complain that the Commission has in essence established an "honor system," and that the industry cannot be trusted to comply with the Commission's rules. First, these entities ignore the fact that Commission licensees are subject to steep monetary forfeitures and other penalties if they are found to be in violation of the Commission's rules. See, e.g., News Release, "Commission Adopts Notice of Apparent Liability," released October 22, 1997 (proposing a forfeiture of \$650,000 against a PCS licensee for a violation of Rule Section 1.2105(c)). Commission licensees that have failed to construct their facilities in accordance with their license and Commission rules have suffered harsh

³ In its comments, the Vermont Environmental Board ("Vermont") describes just the sort of State/local regulatory scheme that Congress intended to preempt (as applied to RF emissions) when it adopted a national wireless facilities siting policy in the 1996 Act. While Ameritech is very much in favor of effective environmental regulation, such as Vermont's Act 250 [codified at Title 10, Chapter 151 of Vermont Statutes Annotated], Ameritech strenuously objects to any state or local government's treatment and regulation of RF emissions as "air pollution." Indeed, the Vermont legislature recently affirmed this misperception when it considered and rejected an amendment to Act 250 that would have correctly eliminated jurisdiction over RF emissions as undue air pollution. Vermont Comments at 6. To be sure, Vermont appears to be making an effort to streamline its permitting process for towers and other communications facilities under Act 250, and provides examples to demonstrate approval of certain land use permits in 6 weeks to 3 months. See, Vermont Comments at Exhibits G, H. However, Vermont's willingness to make facilities siting decisions which are based on RF exposure and propagation issues, and the willingness of its environmental regulators to substitute their own judgment for that of the FCC, is demonstrated in a recent decision denying the siting application of a broadcast facility. See, Vermont Comments at Exhibit J, pages 9-12. Congress intended to promote uniformity of regulation so there could be rapid buildout of a wireless infrastructure. It did not intend for personal wireless service providers to be subject to a myriad of potentially conflicting RF regulations.

consequences. See MobileMedia Corporation, Mimeo No. FCC 97-124, WT Docket No. 97-115 [1997 FCC Lexis 1890] (Released April 8, 1997); Otis Hale d/b/a Mobilfone Communications, Summary Decision, FCC 85-567, CC Docket Nos. 82-15, 82-16, Released March 4, 1986. In addition to monetary fines, these licensees can have their authority revoked under Section 312 of the Communications Act. Even if the violation does not warrant revocation, these licensees may lose their renewal expectancy, creating the risk that a competing application may be successfully filed against them at the end of the initial license term. These dire consequences are a more than adequate deterrent against violations.

Moreover, enforcement of the Commission's rules is the sole responsibility of the Commission, not state and local governments. See Comments of Primeco at pp. 5-7; Comments of CTIA at pp. 7-8. Therefore, the Commission should require that licensees furnish only a certification of compliance under the first alternative. For the same reasons, the Commission's use of a rebuttable presumption of compliance by its licensees is appropriate. Contrary to the arguments of NLC, the Commission will not be "presuming away" its statutory obligations. Instead, it will be fulfilling its statutory mandate to facilitate rapid deployment of advance technologies, by eliminating the requirement that licensees prove their compliance to entities without sufficient expertise in RF matters, even though these licensees have already met the Commissions standards.

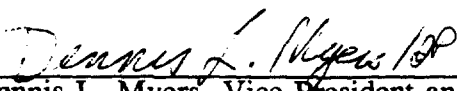
Finally, Ameritech agrees with PCIA that the Commission should act on petitions for relief from state and local actions within 30 days of the comment cycle, so that licensees can implement their systems rapidly and with certainty. See PCIA Comments at p. 5.

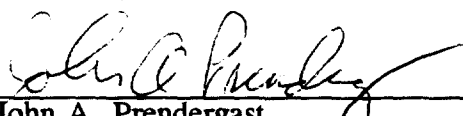
Conclusion

In light of the foregoing, it is respectfully requested that the Commission adopt procedures for state and local inquiries about RF exposure compliance as discussed above.

Respectfully submitted,

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